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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CARL L. JIMENA,

Plaintiff and Appellant,

v.

111 ZUMA CORPORATION,

Defendant and Respondent.

B163780

(Los Angeles County  
Super. Ct. No. BC269653)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Elizabeth A. Grimes, Judge. Reversed.

Carl L. Jimena, in propria persona, for Plaintiff and Appellant.

Law Offices of Robert G. Pierce and Robert G. Pierce; Charlotte E. Costan for  
Defendant and Respondent.

On March 8, 2002, plaintiff and appellant Carl Jimena filed a lawsuit against the Zuma Corporation, bringing causes of action for negligence and breach of contract.<sup>1</sup> The complaint alleged that plaintiff was the victim of theft and violent crime while staying at the Frontier Hotel, a residential hotel owned by defendant, and that defendant's negligence caused or contributed to his injuries.

In July, plaintiff filed a request for entry of default which was rejected on procedural grounds, but in August, after he filed a new request, a default was entered by the clerk. Plaintiff's request was accompanied by a declaration of a process server regarding service of the summons and complaint (ultimately by substituted service) on Robert Frontiera, defendant's agent for service of process, in March of 2002. On September 26 the trial court entered a default judgment in the amount of \$18,072.58, plus costs. On October 9, 2002, plaintiff filed a notice of appeal from that judgment.

On October 23, 2002, defendant moved under Code of Civil Procedure section 473 to set aside the default and default judgment on the ground that those orders were entered through mistake, inadvertence, surprise, or excusable neglect. The motion was accompanied by the declarations of Robert Frontiera and of defendant's counsel, to the general effect that defendant was not served with the summons and complaint. In response, plaintiff argued that the notice of appeal deprived the trial court of jurisdiction.

On December 4, the trial court granted the motion to set aside the default, finding that the defendant had satisfied the court that it had no notice of the lawsuit before August and that the default judgment was entered through mistake, surprise, or excusable neglect. The minute order also states that "defendant will hold its answer in abeyance until this court has received a remittitur returning it to the Superior Court."

Plaintiff appealed. He contends, correctly, that the notice of appeal divested the trial court of jurisdiction to hear and decide the motion under Code of Civil Procedure section 473. "[T]he perfecting of an appeal stays proceedings in the trial court upon the judgment appealed from (Code Civ. Proc., § 916). During the pendency of an appeal, the

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<sup>1</sup> We have taken judicial notice of the Superior Court's file in this case.

trial court is without power to hear a motion to vacate judgment from which an appeal has been taken." (*Copley v. Copley* (1981) 126 Cal.App.3d 248, 298.) This includes motions under section 473 to vacate default judgments. (*Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 629.)

Defendant's argument on appeal is based on the rule that a void judgment may be set aside at any time. Defendant cites the trial court finding that it did not have notice of the lawsuit and concludes that because there was no notice, the judgment was void and could be set aside while the earlier appeal was pending in this Court.

The rule, however, is that a judgment which is void *on its face* may be set aside at any time. "It is the settled law of California that a judgment or order which is void on its face, because its infirmity is determinable from an inspection of the judgment roll or the record, may be set aside on motion at any time after its entry by the court which rendered the judgment or made the order." (*Lovret v. Seyfarth* (1972) 22 Cal.App.3d 841, 854.)

*Andrisani v. Saugus Colony Limited* (1992) 8 Cal.App.4th 517, cited by defendant, only proves the point. There, we held that a trial court had jurisdiction to vacate orders which were void because they were made when a petition for review in the matter was pending with the California Supreme Court, finding that "The voidness of an order made while the trial court is without jurisdiction because of a pending appeal is determinable from an inspection of the record and, therefore, the order is void on its face." (*Id.* at p. 523.)

Here, there is no contention that either the default or default judgment was void on its face. Instead, defendant's motion under Code of Civil Procedure section 473 required the trial court to examine the declarations submitted by defendant and to exercise its discretion. (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 897-898.) It was without jurisdiction to do so.

Disposition

The order granting relief from default is reversed. Plaintiff to recover costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P.J.

MOSK, J.